

Ramilla (Migration) [2019] AATA 3260 (27 March 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Kristine Salimao Ramilla
CASE NUMBER:	1716719
HOME AFFAIRS REFERENCE(S):	BCC2015/3689929
MEMBER:	Hugh Sanderson
DATE:	27 March 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2) of Schedule 2 to the Regulations; • cl.820.221 of Schedule 2 to the Regulations; and • r.2.03A

Statement made on 27 March 2019 at 4:18pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine de facto relationship – sponsor as the primary income earner – day-to-day household expenses – delay in divorcing former partner – plans for the future – 12 month requirement – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 5 December 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the applicant was the de facto partner, as defined in s.5CB of the Act, of the sponsoring partner.

Background

5. The applicant is a citizen of the Philippines and is currently 31 years old. The sponsor of the applicant is Shane Mulcahy. He was born in Australia and is an Australian citizen. He is currently 59 years old. He was previously married and separated from his wife in 2005. He is still married to her. They have two children of that relationship, Bradley currently 32 years old and Erin currently 30 years old.
6. It was claimed that the parties first met each other in June 2009 when the sponsor was working in the Philippines. They claimed to have started a de facto relationship on 15 December 2009.
7. The applicant's movement records show that she has entered Australia on Visitor visas over the following periods:
 - From 29 April 2013 to 9 May 2013;
 - From 9 August 2014 to 20 August 2014;
 - From 8 December 2014 to 24 September 2016;
 - From 9 October 2016 to 29 December 2016;
 - From 11 January 2017 to 21 August 2017;
 - From 2 September 2017 to 16 May 2018; and
 - From 24 May 2018.
8. The sponsor's movement records show that he departed Australia on 22 November 2007 and did not return again until 15 August 2010. Since then, he has departed Australia on 23 occasions for varying lengths of time. On eight occasions that the applicant entered or departed Australia she was travelling with the sponsor.
9. When the applicant applied for a Visitor visa on 4 March 2015 she stated that the reason for the stay in Australia was that her fiancé had secured a 12 month contract and wanted her to extend her stay in Australia before returning to the Philippines. She described her relationship status as "engaged". In the application she made the following statement:

10. I have been living with my fiancé in a de facto relationship in the Philippines for a period of six years. We are now living together in Australia and intend to marry next year. I am looking to extend my existing visa to comply with the terms of this Visa which required me to exit by 8 March 2015.

11. The applicant provided various statements in support of the application from friends of the parties claiming that they believe the parties were in a de facto relationship. The department wrote to the applicant on 15 March 2017 requesting they provide more information in support of the application. Nothing further was provided.
12. The delegate who considered the application noted the following issues:
 - Although claiming to have pooled their financial resources, there was no independent information to confirm any of their claims as to the financial aspects of the relationship;
 - Photo identification cards were provided showing the parties addresses at Pymble and The Entrance, however, there was no documentary evidence to indicate the parties had established a household together at any time;
 - The two statements from friends, who have only known the parties for less than five years, do not provide any convincing information as to the social aspects of the relationship; and
 - Although claiming to have been in a relationship since 2009, no information has been provided of any relationship between the parties prior to the applicant's arrival in Australia.
13. Taking these matters into account, the delegate was not satisfied that the applicant was the de facto partner of the sponsor as defined in s.5CB. The delegate found the applicant did not meet the criteria in cl.820.211(2) and refused the application.

Information to the Tribunal

14. The applicant provided further information to the Tribunal including the following:
 - Photos of the applicant and sponsor together with family members and at various social events;
 - The wills of the parties;
 - Statements from the parties;
 - Statements by family members of the sponsor in support of application;
 - Statement by the sponsor and his former wife as to their property settlement arrangement.
15. The applicant appeared before the Tribunal on 14 March 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
16. The parties gave consistent information as to various aspects of their relationship. This included details of where they had been living together in the Philippines and in Australia over the course of their relationship. They provided details of their financial affairs and each other's work. The applicant provided information as to the sponsor's work and his travel since they had been living together in Australia. They provided details of the arrangements within their home, including who does most of the cooking, cleaning and other household chores.

17. Information was provided as to why the sponsor has not yet divorced his wife. The parties provided details of various social activities they have participated in with their extended families. Information was also provided as to financial support the sponsor has given to the applicant's family and details of their lives together when living in the Philippines. They gave evidence as to the plans for their future together.
18. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The issue in the present case is whether the applicant is the de facto partner, as defined in s.5CB of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

20. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

21. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
22. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Financial aspects

23. There is little information which would indicate the parties have any joint assets or joint liabilities or have been pooling their financial resources. Neither the applicant nor the sponsor has any significant assets in their own name and it is not, therefore, surprising that they do not jointly own any significant assets. The home in which they currently reside is rented in their sole name of the sponsor as at the time the parties moved into that home the applicant was on a Visitor visa and did not have any income.
24. The parties have recently opened a joint bank account, however, both have accounts in their sole name into which their incomes are paid. The joint bank account was opened as shares due to the sponsor are held in escrow and are shortly to vest and it is the intention of the sponsor to have them invested into their joint names and, as a requirement, they were required to open a joint bank account.
25. The parties generally shop together and meet the day-to-day household expenses from their shared incomes. The sponsor has also contributed to the cost of the applicant's Open College course which she is currently undertaking.

26. Although limited, the parties' financial arrangements supports a finding that they are living together and that their relationship is genuine and continuing. Their day-to-day costs are shared with the sponsor, as the primary income earner, providing significant financial assistance to the applicant and her family. The sponsor has been doing this throughout their relationship.

Household

27. The parties commenced living together in December 2009 in the Philippines. The parties provided consistent information as to where they have been living throughout their relationship both in Australia and the Philippines. Documentation has been provided addressed to the parties individually to the homes they have been sharing.
28. The parties provided consistent information as to the arrangements within their household. This included details of who was responsible for the house work and the other domestic activities within the home.
29. The Tribunal finds that the parties have been living together since they commenced their de facto relationship in December 2009. The living arrangements within their home indicate that the parties have a mutual commitment to a shared life to the exclusion of all others and that their relationship is genuine and continuing.

Social aspects

30. The parties provided numerous photos of various social activities they have participated in together throughout their relationship. This has included photos of the parties together with the applicant's family, including her parents who are now deceased, when they were living in the Philippines and also photos of the parties together with the sponsor's family in Australia.
31. Statements have been provided by family members of the sponsor stating that they are aware of the sponsor's relationship with the applicant, including when it commenced and their lives together since then, and that they believe the relationship is genuine. The parties have participated in numerous social activities together including attending family functions. This includes the sponsor returning with the applicant to the Philippines to attend her parents' funerals. The applicant and the sponsor attended together the weddings of the sponsor's children in Australia.
32. The Tribunal finds that the parties have throughout their relationship represented themselves as being in a de facto relationship. This relationship is recognised by their friends and family as being genuine. The parties continue to participate in various social activities together with plans for their future. The Tribunal finds the social aspects of the relationship indicates the parties having mutual commitment to a shared life together, that their relationship is genuine and continuing and that they are living together.

Nature of commitment

33. The parties claim to have commenced their de facto relationship in December 2009 when they started living together in the Philippines. The sponsor's work, at that time, was based mainly in the Philippines although he continued to travel regularly back to Australia for short periods. The parties have now been living together for over nine years.
34. Despite having separated from his former wife in 2006, the sponsor has not yet divorced his wife. Various explanations were provided as to why he has not done this. The sponsor and his wife have maintained an amicable relationship despite the fact that their marital relationship has ended. As the sponsor and his former wife have children together and even

though the children are now adults and have families of their own, the Tribunal recognises that it is to the credit of the sponsor and his former wife they have been able to maintain an amicable relationship if only for the sake of their children. The sponsor believes that his former wife has re-partnered. The sponsor and his former wife arranged for their former matrimonial home to be sold of the proceeds divided after their relationship ended. The Tribunal accepts that the sponsor has not been in any continuing relationship with his former wife at any time since 2009 over the period when the parties were in a de facto relationship.

35. The sponsor's work has required him to be engaged in almost constant travel. When his work has required him to spend the majority of his time in Australia, the applicant has arranged to be granted a Visitor visa to live with him in Australia. In her most recent Visitor visa application in March 2015 the applicant stated the reason for the application was to be able to live in Australia with her fiancé and disclosed the fact that they had been in a de facto relationship in the Philippines for a period of six years at that time. This is consistent with the information that has been provided in support of this application.
36. The Tribunal has had the advantage of interviewing the applicant and the sponsor together. They displayed the degree of companionship and emotional support to each other which would be expected in a genuine relationship. They provided details of their plans for their future together including why they have not yet married, their plans to get married, why they have not yet had children and their plans to have children together.
37. The Tribunal finds that the parties display the degree of companionship and emotional support which would be expected in a genuine and continuing relationship. The degree of commitment they show to each other indicates that they are in a mutually exclusive relationship. The plans they have provided show that they consider their relationship as long-term.

Overall assessment

38. The Tribunal has considered the information before it both individually and cumulatively. The most significant factor in the relationship between the applicant and the sponsor is the fact that they have been living together for over nine years both in the Philippines and in Australia. They have displayed over this period a degree of commitment to their relationship and a willingness to provide each other support which would be expected in a genuine relationship. They have also provided support to each other's extended families and they have been welcomed into those families.
39. The Tribunal finds that the parties have a mutual commitment to a shared life to the exclusion of all others. The Tribunal finds that the parties relationship is genuine and continuing and that they lived together on a permanent basis.
40. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision. Therefore the applicant meets cl.820.211(2)(a).
41. At the time of the application the applicant was sponsored by the applicant's de facto partner who was over the age of 18. She continues to be sponsored by her de facto partner. Therefore the applicant meets cl.820.211(2)(c).
42. At the time of the application the applicant held a substantive visa. Therefore the criteria in cl.820.211(2)(d) is not relevant.

43. The Tribunal finds the applicant meets the criteria in cl.820.211(2) and continues to meet all the criteria time of this decision. Accordingly, the applicant meets the time of decision criteria in cl.820.221.

Are the additional criteria for a de facto relationship met?

44. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
45. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
46. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement.
47. The Tribunal finds that the parties commenced their relationship in December 2009 and have continued to be in a de facto relationship since then. Photos have been provided of the parties living together in the Philippines and the information provided by the applicant in her Visitor visa application is consistent with the claim that the parties have been living together in a de facto relationship since 2009. The information provided by the parties to the Tribunal at the hearing was also consistent with the claims that they had been living together in a de facto relationship since 2009.
48. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
49. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
50. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

51. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).